

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 944 of 2002

WITH

CRIMINAL APPEAL No. 149 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

AMRATLAL BUDHARAMJI - Appellant
Versus
STATE OF GUJARAT - Opponent

Appearance :

CRIMINAL APPEAL NO. 944 OF 2002

MR RAJESH M AGRAWAL for Appellant.
MR KT DAVE, APP for Opponent.

CRIMINAL APPEAL NO. 149 OF 2003

MR E E SAIYED for Appellant.
MR KT DAVE, APP for Opponent.

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CORAM :	HONOURABLE MR.JUSTICE A.M.KAPADIA
	and
	HONOURABLE MR.JUSTICE K.A.PUJ

Date : 24/01/2007
COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. These two appeals are filed by the appellants, namely, Amratlal Budharamji and Fakirmohammad Piruji Mansuri - original accused Nos. 2 & 1 respectively, against the same judgment and order dated 23.09.2002 passed in Sessions Case No. 79 of 2001 by the learned Additional Sessions Judge, Court No. 10, Ahmedabad and since both the appeals are heard together, the same are being disposed of by

this common judgment.

2. Criminal Appeal No. 944 of 2002 is filed by the appellant – original accused No. 2 challenging the correctness, legality, validity or propriety of his conviction under Section 8 (c) read with Section 21 & 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as “the Act”) and sentence of 10 years R.I. And to pay a fine of Rs. 1 Lac and in default thereof, further to undergo R.I. for two years.

3. Similarly, Criminal Appeal No. 149 of 2003 is filed by the appellant – original accused No. 1 i.e. Fakirmohammad Piruji Mansuri against the very judgment dated 23.09.2002 passed in Sessions Case No. 79 of 2001 by the learned Additional Sessions Judge, Ahmedabad convicting him under Section 8 (c) read with Section 21 & 29 of the Act and sentencing him to undergo R.I. for 10 years and fine of Rs. 1 Lac and in default thereof, further to

undergo R.I. for two years.

4. The brief facts as emerged from the complaint and revealed during the course of trial are as under :-

The complainant, Mr. B.M. Rajvanshi, Police Inspector, CID Crime, Gujarat State, on 03.03.2001 at about 10.50 a.m. was at his home at Ambavadi, Ahmedabad. At that time, he received the secret information and at about 11.00 a.m. he left his home and reached Gandhinagar at 11.40 a.m. and secret information was noted in information register at 11.50 a.m. Thereafter, he came to Meghaninagar, Ahmedabad and after following the necessary procedure, he along with the members of raiding party and Panchas reached to the place of information and kept watch there and at about 2.20 p.m. on getting signal from the informant, they stopped two persons who were coming from VIP gate towards Kalu Bawa Saiyedji mosque and they both were stopped near Cochin depo gate and they were taken to open space near railway station and after

following necessary procedure, they were searched. While searching the accused No. 1, one packet tied on his left thigh was found and it was found brown sugar weighing about 520 Grams. On personal search of the accused No. 2, no incriminating material was found. After following necessary procedure, the same was seized under the Panchnama and the samples were taken and accused Nos. 1 & 2 both were arrested and were taken to the Police station. Mr. B.M. Rajvanshi, PI, CID Crime gave a complaint and the offence was registered and investigation was further started and after completion of the investigation, the police submitted charge-sheet in the City Sessions Court, Ahmedabad which was registered as Sessions Case No. 79 of 2001.

5. The charge was read over and explained to the accused. As the accused have not pleaded guilty to the said charge, they were put to trial and tried by the learned Additional Sessions Judge, Ahmedabad

in Sessions Case No. 79 of 2001.

6. To prove the culpability of the accused, prosecution has in all examined as many as 4 witnesses. Prosecution has also produced several documents and relied upon the contents of the same. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Ahmedabad explained the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement, as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by reiterating that they have been falsely implicated.

7. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Additional Sessions Judge, Ahmedabad has held that the prosecution has established beyond reasonable doubt that the charge levelled against

the accused were proved and, therefore, the accused Nos. 1 & 2 were found guilty of the offence punishable under Section 8 (c) read with Section 21 & 29 of the Act and the appellants - original accused Nos. 1 & 2 were found guilty for the offence punishable under Section 8 (c) read with Section 21 & 29 of the Act and were sentenced to suffer R.I. for 10 years and to pay fine of Rs. 1 Lac each and in default of payment of fine, further to suffer R.I. for two years each.

8. Being aggrieved and dissatisfied with the said judgment and order dated 23.09.2002 passed by the learned Additional Sessions Judge, Ahmedabad in Sessions Case No. 79 of 2001, the appellants - original accused Nos. 1 & 2 have preferred these two appeals separately before this Court under Section 374 of the Code of Criminal Procedure.

9. Mr. R.M. Agrawal, learned advocate appearing for the appellant - accused No. 2 in Criminal Appeal No.

944 of 2002 has taken us through the oral as well as documentary evidence which are on record and also assailed the judgment and order of the learned Additional Sessions Judge, Ahmedabad dated 23.09.2002. He has submitted that the learned Additional Sessions Judge has erred in convicting the appellant - accused No. 2 though there was no cogent or adequate evidence showing his guilt in the matter. He has further submitted that the learned Additional Sessions Judge has failed to appreciate that the appellant is innocent and has not committed the alleged offence. Even as per the case of the prosecution, the appellant - original accused No. 2 was found only in the company of the co-accused No. 1 from whose possession, the alleged brown sugar was found and when the search of the present appellant - accused No. 2 was made, nothing incriminating was found from his possession. He has further submitted that there was no iota of evidence at all against the appellant - accused No. 2 connecting him with the alleged commission of offence by original accused No. 1 from whose

possession brown sugar weighing about 520 Grams was found. Despite this fact, the learned Additional Sessions Judge, in flagrant violation of the principles of evaluation and appreciation of evidence in criminal trial, arbitrarily and capriciously convicted and sentenced the appellant – orig. accused No. 2 basing her conclusion only on assumption, presumption, surmises and conjectures, though there is no legal evidence at all connecting the appellant – orig. accused No. 2 with the alleged commission of offence. Merely on the basis of presence of the appellant – orig. accused No. 2 with or in the company of accused No. 1 without any legal, reliable and clinching evidence against the appellant – orig. accused No. 2 connecting him with the alleged commission of offence, the appellant – orig. accused No. 2 could not have been convicted and sentenced. He has further submitted that unlawful possession of the contraband articles is sine-qua-non for the offence under the Act and admittedly, as per the case of the prosecution, the appellant – orig. accused No. 2 was not found in

possession of any contraband and when it is so, then there is no question of his unlawful possession of the contraband and so there is no question of convicting him for the offence punishable under Section 21 & 29 of the Act and sentencing him for the same. There is no iota of evidence at all against the appellant - orig. accused No. 2 for the offence under Section 29 of the Act regarding abetment and criminal conspiracy and so far as the question of abetment is concerned, not a single ingredient of Section 107 of IPC regarding abetment is proved and not a single ingredient under Section 120-B of IPC regarding conspiracy is proved. In spite of this clear position, the learned Additional Sessions Judge, Ahmedabad has convicted and sentenced the appellant - orig. accused No. 2. As per the case of the prosecution, the appellant - orig. accused No. 2 was found in the alleged company of accused No. 1 and from the place where the accused No. 1 was found in possession of contraband brown sugar, both the appellants were taken to Kalupur so that there might not be any traffic hindrance at the place

where they were stopped and at Kalupur, panchnama was prepared and if the evidence adduced by the prosecution is examined, then one thing becomes very clear that the evidence led by the prosecution is very silent as to exactly the appellant - orig. accused No. 2 was doing what and how he was connected with the alleged commission of offence by accused No. 1. The evidence collected by the prosecution stopped short by stating that the appellant - orig. accused No. 2 was in the company of accused No. 1 and more over, if the evidence on record is taken into consideration, then also it becomes manifestly clear that the evidence did not attribute any overtact whatsoever to the appellant - orig. accused No. 2. No iota of evidence is produced by the prosecution in order to conclusively link the appellant - orig. accused No. 2 with the contraband articles allegedly to be possessed by the original accused No. 1.

10. In support of his submission, Mr. Agrawal relied on

the decision of this Court rendered in **Criminal Appeal No. 278 of 2003 with 284 of 2003** decided on 10.10.2006 wherein after considering the various judgments of the Hon'ble Supreme Court, this Court has held that no evidence has come on record which would establish beyond reasonable doubt that the accused in that case was aware about the fact that the accused are having the contraband articles. This Court has further held in that case that simply because the accused No. 3 was accompanying the accused Nos. 1 & 2 and simply because his name was found in the information so received by the concerned Police Officer, it cannot be proved beyond reasonable doubt that the accused No. 3 was aware about the fact that the accused Nos. 1 & 2 were carrying Muddamal contraband articles with them and that he has abetted the accused Nos. 1 & 2 in commission of the alleged offence.

11. Based on the aforesaid factual background and the legal propositions laid down by the Hon'ble Supreme

Court as well as this Court, Mr. Agrawal has strongly urged that no case was made out against appellant - orig. accused No. 2 and he may be acquitted from the charge of offence levelled against him and released forthwith.

12.Mr. E.E. Saiyed, learned advocate appearing for the appellant - orig. accused No. 1 in Criminal Appeal No. 149 of 2003 has submitted that the appellant is from hindi knowing and speaking State, unaware of the language of the Trial Court and as such, the trial must be in the language known to the appellant and this lacuna is fatal to the case of the prosecution and benefit of doubt ought to have been given to the accused No. 1. The evidence, if read as a whole or in part thereof, is absolutely silent about compliance of Section 50 of the Act. Section 50 of the Act confers very important right on the accused and even the slight violation thereof vitiates the whole trial. There is nothing on record that the choice as suggested in Section 50 was given in writing to the appellant -

orig. accused No. 1 and thus the entire trial is vitiated. The mandatory provisions of Sections 55, 57 & 42 were clearly violated by the prosecution and hence, benefit of doubt should have been given to the appellant - orig. accused No. 1. He has further submitted that one Police Constable Mr. Vinod Dantani and the panch witnesses are from the same community and, therefore, the evidence should have been considered from that angle. The accused and muddamal articles were moved from Gandhinagar to Meghaninagar and during this journey, the muddamal was unsafe and, therefore, the muddamal which was attached and sent to chemical analysis were not one and the same and it creates reasonable apprehension and doubt about tampering. The panch witness had admitted in his cross-examination that the documents were prepared by sitting in the office which itself goes against the prosecution. No evidence of witness from Dharmashala was recorded.

13.Mr. Saiyed has further submitted that if the principles laid down by the Hon'ble Supreme Court in the case of **State of Punjab V/s. Baldevsingh, 1993 (3) Crimes 147 SC** are taken into consideration, then it becomes crystal clear that there is flagrant violation of Section 50 of the Act and when it is so, then the conviction recorded only on the basis of the possession of contraband articles recovered from the person of the appellant - orig. accused No. 1 during search cannot be relied upon at all and on this ground alone, the alleged recovery of the contraband article is rendered suspicious and conviction and sentence based thereon stands vitiated. Moreover, there is no evidence at all to come to the conclusion that there is compliance of Section 50 of the Act. Moreover, there is also no evidence at all that existence of right of the accused to be searched before a Gazetted Officer or a Magistrate was brought to his notice and when it is so, then it is clear that there is clear violation of Section 50 of the Act and as a result thereof,

prejudice is caused to the appellant – orig. accused No. 1 and as a result thereof, failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate may render recovery of contraband articles suspicious and conviction and sentence based thereon is bad and unsustainable in law.

14.Mr. Saiyed has further submitted that there is clear violation of Section 57 of the Act. The full report of all the particulars of arrest and of seizure will have to be made within 48 hours next after such arrest or seizure by the Seizing or Arresting Officer to his immediate official superior. The word used in Section 57 is immediate official superior. Admittedly, in this case, complainant Mr. Rajvanshi has not made report under Section 57 of the Act to his immediate official superior and when it is so, conviction and sentence is bad and unsustainable in law and moreover, it can never be said that Section 57 of the Act is complied with at all.

15.Mr. Saiyed has further submitted that there is flagrant violation of Section 55 of the Act. Admittedly, as per the case of the prosecution, PSO has not taken charge and has not kept in his safe custody the articles seized and moreover, PSO has not taken charge and has not kept in his safe custody the articles seized and moreover, PSO has not affixed his own seal on such article and when it is so, then there is violation of Section 55 of the Act. Moreover, if the prosecution evidence is scanned, it also becomes clear that there is no evidence on record at all that from whom seal which was used for affixing seals on the samples and contraband article was taken and after its use to whom it was handed over or returned till the sample reached the FSL Ahmedabad for analysis. Moreover, there is also no evidence on record that subsequent seal which was affixed on the samples and contraband article was affixed in any muddamal register. There is also no evidence that the forwarding letter was prepared on

the spot where the contraband was seized and seal which was used on the sample and contraband was also affixed on the forwarding letter. There was also no evidence to show that the specimen seal was deposited with PSO along with samples and muddamal when the same was handed over to PSO and when there is no evidence of this type, it can certainly be said that there is flagrant violation of Section 55 of the Act. All these precautions are necessary to avoid possibility of tampering with the contents of samples.

16.Mr. Saiyed has further submitted that P.W. 1 - Jivanbhai Mohanbhai Patni who is a panch witness of the panchnama of seizure and who resides at Shahibaug has not supported the case of the prosecution and is declared hostile and according to the learned Additional Sessions Judge, the said witness to some extent supported the case of the prosecution in cross-examination by the prosecution and so also, the learned Additional Sessions Judge

has believed his evidence though the evidence of the said witness ought to have been discarded in toto. The another panch of the said panchnama has not been examined by the prosecution and it was the duty of the prosecution to examine another panch when one panch has not supported the case of the prosecution and is declared hostile. In spite of this position, the learned Additional Sessions Judge believed his evidence by assigning arbitrary and capricious reasons and thus in this case, evidence of other police officer and police personnel P.W. Nos. 2,3 & 4 is not corroborated by the evidence of P.W. No. 1 panch witness. It is further submitted that when the evidence of the police personnel P.W. Nos. 2,3 & 4 is not corroborated at all by the evidence of P.W. No. 1, then under these circumstances, the evidence of Police Officer if the Court wants to believe then it should be of a "sterling quality". If the evidence of P.W. Nos. 2,3 & 4 is closely scrutinized then it becomes clear that by no stretch of imagination or reasoning, it can be said that their evidence is of sterling worth. P.W. No. 2 Mr.

Rajvanshi has also shown his ignorance about the maintenance of the Information Register by whom and in whose possession, it remained and regarding seal and from whom the same was taken and with whom it remained and there is also material contradiction and omissions in the deposition of P.W. No. 2 - Mr. Rajvanshi. Moreover, evidence of P.W. Nos. 3 & 4 is also not of sterling quality. The same is also full of material contradictions and omissions and moreover, person who is not authorised has kept the samples in his custody. Moreover, there is no sufficient evidence as to what precautions were taken to avoid tampering with the contents of the sample and how and in what manner, the same was kept in proper and safe custody. There is no necessary corresponding entries in any register to the effect that the same was deposited and when the same was brought out and by whom the same was handed over to another Police Officer and for want of this type of evidence, no reliance at all can be placed to the effect that the samples and muddamal were kept in proper and safe custody till the samples

reached in FSL office and consequently no reliance can be placed on the report of the FSL.

17. Over and above the aforesaid oral submissions, Mr. Saiyed has also filed written submissions. This written submissions are in respect of the violation of the provisions contained in Sections 50, 52 & 55 of the Act as well as journey of the muddamal and discrepancies found in the evidence of the prosecution witnesses, more particularly, the evidence of Shri Rajvanshi. Along with this written submissions, Mr. Saiyed has annexed a copy of the judgment of the Hon'ble Supreme Court in the case of **Valsala V/s. State of Kerala, JT 1993 (4) S.C. 549**, wherein the seized article was produced in the Court after three months and no evidence was shown as to with whom the seized article was lying and whether it was sealed. Article seized was not in proper custody and proper form. The Court has found that there was inordinate delay and missing link and, therefore, the Court held that the evidence

adduced are wholly insufficient to conclude that what was seized from the appellant alone was not sent to the chemical examination. The Court further held that though this is purely a question of fact, this is an important link. Both Courts below have not examined this aspect in a proper perspective. The Court further held that no doubt the trafficking in narcotic drugs is a menace to the society but in the absence of satisfactory proof, the Court cannot convict. The Court, therefore, set aside the conviction and sentence.

18.Mr. Saiyed has further annexed a copy of the judgment in the case of **State of Rajasthan V/s. Daulat Ram, 1980 Criminal Law Cases 170** wherein it is held that it is an admitted case of the prosecution that the samples changed several hands before reaching the public analyst. The inevitable effect of this omission is that the prosecution failed to rule out the possibility of the samples being changed or tampered with during this period. This

fact will have to be proved affirmatively by the prosecution. The Court further held that this is the main infirmity which has been relied upon by the High Court in holding that the prosecution has not proved that right from the stage of the seizure of the opium upto the time when the samples were handed over to the public analyst, the seals remained intact. The onus is on the prosecution to prove the entire case at the trial and the prosecution could not be allowed to fill up the gaps or lacuna left at the trial, at the appellate or revisional stage.

19.Mr. Saiyed has also produced a copy of the judgment of the Hon'ble Supreme Court in the case of **K. Mohanan V/s. State of Kerala, (2000) 10 S.C.C. 222** wherein it is held that before subjecting a person to search, the officer concerned must inform him of his right to be searched before a Gazetted Officer or a Magistrate and failure to do so, would cause prejudice to such person. It is further held that whether before conducting the search, the

Police Officer concerned merely asking the appellant - accused whether he was required to be produced before a Gazetted Officer or a Magistrate for the purpose of the search but not informing about his right in that behalf under the law, mandatory requirement of Section 50 is not satisfied. The Court further held that if he had been told about his right, what would have been the answer given by the accused cannot be gauged by at this distance of time. This is particularly so when the main defence adopted by the appellant at all stages was that Section 50 of the Act was not complied with. In view of non-compliance with Section 50, evidence of search spoken to by the Police Officer who had conducted the search cannot be acted upon in the absence of any other independent evidence to show that the appellant was in possession of the contraband articles. The Court, therefore, set aside the conviction and sentence and acquitted the appellant - accused.

20.Lastly, Mr. Saiyed has also annexed a copy of the judgment of Bombay High Court in the case of **Radhakisan Parashar V/s. State, 1988 CRI. L. J. 17** for the proposition that in default of fine, sentence of R.I. of 2 years cannot be imposed. In this case, the Court held that the learned Judge, however, after imposing the mandatory sentence of fine further directed that in default of the payment of fine, the appellant has to undergo further period of R.I. for 2 years. The Court took the view that this further imprisonment in default is not, in the circumstances of the case, justified to the extent it was imposed. The Court, therefore, held that in default of the payment of fine of Rs. 1 Lac, the appellant should undergo further period of R.I. for a period of one year only.

21.Based on the aforesaid submissions, Mr. Saiyed has strongly urged that the appellant - orig. accused No.1 deserves to be acquitted from the charge of offence levelled against him and he also deserves to

be released forthwith.

22.Mr. K. T. Dave, learned Additional Public Prosecutor, on the other hand has supported the order and judgment of the learned Additional Sessions Judge, Ahmedabad and submitted that there was no violation of any statutory provision and all necessary compliances were made by the raiding parties and/or investigating agency and there was no substance in the argument that the provisions contained in Section 50, 55 & 57 of the Act were violated. He has relied on the decision of the Hon'ble Supreme Court in the case of **State of Punjab V/s. Balbir Singh, (1994) 3 S.C.C. 299** wherein it is held that the provisions of Section 52 & 57 are by themselves not mandatory. These provisions contain certain procedural instructions for strict compliance by the Officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these Officers null and void and at the most it may affect the

probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore, it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. Mr. Dave has further submitted that the prosecution has clearly established beyond reasonable doubt the charges levelled against both the accused as the accused Nos. 1 & 2 were found in the company of each other. The accused No. 1 was found in conscious possession of brown sugar and the accused No. 2 has aided and abetted the accused No. 1 in regard thereto. He was found in the company of accused No. 1 and he was aware about the fact that the accused No. 1 was possessing contraband articles with him. He has, therefore, submitted that both the accused were rightly implicated in the said offence. Since the prosecution has established by all possible, believable, trustworthy and corroborative evidence and since

the documentary evidence on the record of the proceedings clearly establish the involvement, presence and role of each of the accused in the offences charged with, even if there is any discrepancy from the testimonies of the prosecution witnesses, the same would not affect the case of the prosecution. The prosecution having clearly established beyond reasonable doubt the guilt of both the accused, the conviction order passed by the Learned Additional Sessions Judge is required to be upheld.

23. In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the Learned Trial Judge has recorded a just and correct conclusion holding the accused Nos. 1 & 2 guilty, we may first advert to the oral testimony of the prosecution witnesses.

24. The case of the prosecution is more or less based on

the evidence of police personnels. There are in all 4 prosecution witnesses.

A) P.W. 1 - Jivanbhai Mohanbhai Patni is a panch witness. He turned hostile and he did not support the case of the prosecution.

B) P.W. 2 - B.M. Rajvanshi is the Investigating Officer and he has filed the complaint. He got the first information and after following necessary formalities, he conducted the raid. From his deposition, it becomes clear that the contraband article brown sugar was found from the possession of the appellant - accused No. 1. He has explained in detail the entire sealing procedure in his deposition. He has also confirmed the fact regarding drawing of panchnama, seizure memo, arrest memo as well as recording of information in the station diary etc. In his cross-examination, he has straightway denied the fact that the panchnama, seizure memo and other documents were prepared

in his office.

C) P.W. 3 - Omnarayansinh M. Vaghela is the police personnel working in CID Crime, Narcotic Cell. He has confirmed that PSI Rana has handed over the samples of contraband articles and ravangi form to be delivered at FSL.

D) P.W. 4 - Jashubha Pathbha Rana is a PSI and one of the members of the raiding party. He has explained the movement of the muddamal articles in his deposition and also confirmed as to how the samples were sent to FSL as well as the report was received from FSL.

25. The main documentary evidence on which reliance is placed by the prosecution is the complaint, raiding panchnama, FSL Report and other documents supporting the case of the prosecution with regard to satisfaction of all the requisite formalities laid

down under the Act.

26.From the detailed examination and analysis of the prosecution witnesses and the documentary evidence produced on record by the prosecution, it appears to us that the charge levelled against the accused No. 1 has been proved beyond any reasonable doubt. The Learned Trial Judge has discussed the evidence of each witnesses and the documentary evidence at great length and the conclusion drawn by her after proper appreciation of the evidence is just and proper and we are in complete agreement with the finding arrived at by the Learned Trial Judge so far as the accused No. 1 is concerned.

27.The contention raised by Mr. Saiyed with regard to violation of the provisions contained in Sections 50, 52 & 55 of the Act and with regard to the journey of the muddamal articles and some of the discrepancies pointed out by him in the evidence of the prosecution

witnesses are not persuading us to take a contrary view then the view taken by the Learned Trial Judge. The judgments relied on by him are based on the facts of those cases and they would not render any assistance to the facts of the present case. The evidence led by the prosecution and discussed by the Learned Trial Judge makes it abundantly clear that there was no violation of any statutory provision and proper record was maintained with regard to the muddamal articles. Even there was no defect in the sealing procedure. We, therefore, do not want to interfere in the judgment and order passed by the Learned Trial Judge imposing substantive sentence of R.I. of 10 years and fine of Rs. 1 Lac. However, in default of fine, further sentence of R.I. of 2 years imposed by the Learned Trial Judge is not just and proper and to this extent, we modify the order of the Learned Trial Judge by imposing the sentence of six months instead of 2 years in default of payment of fine. Hence, the appeal of the appellant - orig. accused No. 1 being Criminal Appeal No. 149 of 2003 is partly allowed to this extent.

28. So far as Criminal Appeal No. 944 of 2002 is concerned, though several contentions were raised before the Trial Court and before this Court by the learned advocate appearing for the original accused No. 2 challenging his conviction, we do not, however, think it just and proper to deal with all these contentions as his conviction and sentence is liable to be vitiated only on the ground that no evidence has come on record which would establish beyond reasonable doubt that the accused No. 2 was aware about the fact that the accused No. 1 was having the contraband articles. As such, there is no independent evidence establishing the fact that the accused No. 2 was also involved in commission of this offence.

29. In the case of **State of Punjab V/s. Balkar Singh and another, (2004) 3 S.C.C. 582,** the accused were alleged to have been found present at the place where about 100 bags of poppy were recovered.

They were sitting on such bags and they have failed to give any satisfactory explanation for being present at that place. The Hon'ble Supreme Court in that case has considered the question as to whether mere presence of the accused is enough to take the view that the accused was in conscious possession of prohibited substance. The Hon'ble Supreme Court held that mere being found to be present at the place where the poppy husk bags were found and the failure to give any satisfactory explanation for being so present did not prove that the accused persons were in possession of the said poppy husk bags. Similarly, in the present case, simply because the accused No. 2 was accompanying the accused No.1 and simply because his name was found in the information so received by Mr. Rajvanshi, it cannot be proved beyond reasonable doubt that the accused No. 2 was aware about the fact that the accused No. 1 was carrying Muddamal contraband articles with him and that he has abetted the accused No. 1 in commission of the alleged offence.

30. In the case of **Sorabkhan Gandhkhan Pathan and another vs. State of Gujarat, reported in (2004) 13 Supreme Court Cases 608**, the Hon'ble Supreme Court has acquitted the accused No. 2 who was travelling in an auto-rickshaw by holding that no material was produced to establish that the accused No.2 in that case had knowledge that accused No.1 was carrying contraband articles or was conniving with the said accused in carrying the contraband articles and hence conviction of accused No.2, in absence of any such material, only on the basis of his being in the auto-rickshaw was not sustainable. On the same parity of reasoning, the conviction of the accused No. 2 in the present case cannot be sustained simply because he was in the company of the accused No. 1 without there being any material on record to show that he was aware about the fact that the accused No. 1 was carrying the contraband articles with him or that he was conniving with the accused No. 1 in carrying the contraband articles.

31. In the case of **Narcotics Control Bureau, Jodhpur V/s. Murlidhar Soni and others, (2004) 5 S.C.C. 151**, the Hon'ble Supreme Court was concerned with a case where accused's father (since died) was carrying a cloth bundle containing contraband, and the role of the accused was only to take his father on his scooter to the place where they were allegedly arrested. There was no evidence showing that accused had knowledge that the bundle contained any contraband articles. In absence of any material showing conscious possession of the contraband by the accused and the accused's father being dead, it was held that accused cannot be said to be in possession of any contraband articles and hence, his conviction under Section 21 was rightly set aside by the High Court. The Court was also in agreement with the finding of the High Court that the statements of the accused persons have been obtained by the Prosecuting Agency under duress. In the present case also, there is no other evidence

which would justify the conviction of the accused No.2.

32.In the above view of the matter and looking to the peculiar facts of the present case and in light of the decisions referred to herein above and the principles laid down therein, we are of the opinion that the conviction order passed against the accused No. 2 cannot be sustained. Hence, the Appeal being Criminal Appeal No. 944 of 2002 succeeds. The order of the learned Additional Sessions Judge, Ahmedabad dated 23.09.2002 passed in Sessions Case No. 79 of 2001 convicting the accused No. 2 for offences punishable under Section 8 (c) read with Section 21 and 29 of the Act and sentencing him to rigorous imprisonment of 10 years and fine of Rs. 1 Lacs and in default thereof, R.I. of two years more for commission of such offence is hereby quashed and set aside. The appellant – original accused No. 2 – Amratlal Budharamji in Criminal Appeal No. 944 of 2002 is hereby acquitted from the charges levelled

against them. The respondent – State of Gujarat and the jail authority is hereby directed to release the appellant – original accused No. 2 in Criminal Appeal No. 944 of 2002 from jail forthwith unless his presence is required in connection with any other case. Amount of fine, if paid shall be refunded to him.

33. In the result, Criminal Appeal No. 944 of 2002 is allowed and conviction and sentence of the appellant – orig. accused No. 2 is quashed and set aside. Criminal Appeal No. 149 of 2003 is partly allowed whereby the conviction and substantive sentence of the appellant – orig. accused No. 1 is confirmed and sentence of R.I. of two years imposed by the Learned Trial Judge in default of payment of fine of Rs. 1 Lac is substituted by sentence of six months only.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]